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IN THE SUPREME COURT
of the
STATE OF UTAH

THE WESTERN PACIFIC RAIL-
ROAD CO., a corporation,

Plaintiff and Respondent,

vs.

WASATCH CHEMICAL CO., a cor-
poration,

Defendant and Appellant.

FILED

NOV 1 1949

CLERK, SUPREME COURT, UTAH

RESPONDENT'S BRIEF

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Case No.
7399

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent takes exception to the statement of facts appearing in Appellant's Brief. While the so-called "nature of action" on page 2 thereof constitutes a concise statement of the case, the Statement of Facts is not supported in any manner by the record and, so far as appears therefrom, is a product of counsel's imagination.

Plaintiff is a railroad operating as a common carrier between points in California and Utah. As stipulated by the parties, (Tr. 46) on or about the dates indicated in Exhibit "A" attached to and made a part of Plaintiff's Complaint, there were shipped over Plaintiff's lines from San Jose, California to Defendant at Salt Lake City the commodity in question. Defendant received the items and paid Plaintiff the amounts shown on said Exhibit "A" under the column captioned "Amount Paid." Plaintiff claims that under the provisions of the applicable tariffs, the proper charge was that shown on said Exhibit "A" under the column "Tariff Charges" and brought this action for the difference between the two amounts, being the amount shown as "Balance Due" on Exhibit "A," plus the applicable federal tax on the transportation of property shown under the caption "Tax."

The only item shipped in each instance as an "Automatic Spray Dip" manufactured by the Livestock Sprayer Manufacturing Company of San Jose, California, as portrayed in Plaintiff's Exhibits "A" and "B," and Defendant's Exhibits 1, 2, 3 and 4 and described as "a combination of a motor, a pump, a storage tank, a filtering device, spray nozzles and an enclosure or device for holding or restraining cattle while being sprayed with D.D.T. or other new and modern insecticides, mounted on two wheels and an axle with a draw bar and stand equipment." (Tr. 28). The only issue before the trial court was, under the applicable tariff published by Plaintiff Railroad (Exhibit "C"), what

was the proper rate required to have been paid to Plaintiff by Defendant pursuant to the Interstate Commerce Act? The trial court found the issue of law in favor of Plaintiff and held that the article transported by Plaintiff and delivered to Defendant is properly classified as a livestock spraying pen or chute, wood and steel combined, Item No. 16937 of Western Classification No. 72 contained in Consolidated Freight Classification No. 17, and sprayers N.O.I.B.N. with engines, Item No. 41017 of said classification, a combination article, set up, to which under the provisions of Rule 18 of said Consolidated Freight Classification No. 17 a first class rate is applicable. The trial court thereupon entered judgment in favor of Plaintiff and against Defendant for the amount prayed, together with costs of court.

ARGUMENT

I.

THE REASONABLENESS OF THE RATE FOUND BY THE TRIAL COURT TO BE APPLICABLE IS NOT IN ISSUE BEFORE THIS COURT.

A. Appellant has assigned as error "The trial court erred in failing and refusing to submit to a jury the issue of reasonableness of the classification" and argues that the classification applied by Respondent and sustained by the trial court was unreasonable. It is generally held that a shipper cannot maintain an action in either a state or a federal court to obtain relief

from an alleged unreasonable freight rate exacted or proposed to be exacted from him for an interstate shipment where the rates so challenged have been filed and published by the carrier pursuant to law and have not been found to be unreasonable by the Interstate Commerce Commission. He must, under the Interstate Commerce Act, primarily invoke redress from the Interstate Commerce Commission, which body alone is vested with power to entertain original proceedings for the alteration of an established schedule upon the ground that the rates fixed therein are unreasonable. (9 Am. Jur., Carriers, Section 180.) See

Baldwin v. Scott County Milling Co. (1939), 307 U.S. 478, 83 L. Ed. 1409.

where the court held:

“In the absence of prior finding by the Commission that the tariff charges collected for interstate transportation are unreasonable, there can be no enforceable claim for damages caused by exactions according to the tariff.”

There is nothing in the record which indicates that Appellant has ever had resort to the Interstate Commerce Commission to determine whether or not the rate and classification applied by Respondent is reasonable or that the Commission has ever so found. Until Appellant can show that it has exhausted its administrative remedy

in this regard, it has no standing to raise the issue of reasonableness.

It is well settled that in a court proceeding for an under-charge, the question of the unreasonableness or unlawfulness of a rate, charge or classification is not open. The only question is that of tariff application, regardless of the inherent lawfulness or unlawfulness of the resultant charges. See, for example,

Davis v. Portland Seed Company, 264 U. S. 403, 63 Law Ed. 762 (1924).

where the tariff provision involved was in violation of Section Four of the Interstate Commerce Act and yet the court refused to give relief to the shipper, saying:

“The Statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified.” (Page 425)

It is well settled that the question of reasonableness is not open to the court but only to the Interstate Commerce Commission. See

Great Northern Railway Co. v. Merchants' Elevator Co., 259 U. S. 285, 66 Law Ed. 943 (1922).

and

Crancer v. Lowden, 315 U. S. 631, 86 Law Ed. 1077 (1942).

In the last named case, in a suit for under-charges, the court said:

“The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them.” (Page 635).

B. Unreasonableness of the rate as a defense would be in the nature of a counterclaim for damages and not only must first be raised before the Interstate Commerce Commission but must also be pleaded as such. Not only is there nothing in the record to indicate that Appellant raised the issue of reasonableness before the Interstate Commerce Commission but there is also nothing to indicate that Appellant raised the issue of reasonableness in the court below. There is no reference in the pleadings or elsewhere in the record claiming that the rate asserted to be due by Plaintiff was unreasonable. The first and only reference appears in Appellant's brief. It is elementary that issues not raised by pleading or not presented to or passed upon by the trial court will not be reviewed by the Supreme Court on appeal.

Woolf v. Gray, 48 Utah 239, 158 Pac. 788 (1916)

Utah Assets v. Dooley Bros. Assn.—(1937) 92 Utah 577, 70 Pac. 2d. 738.

Bucher v. Equitable Life Assurance Society—(1937) 91 Utah 179, 63 Pac. 2d. 604.

II.

THE TRIAL COURT DID NOT ERR IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Appellant apparently presents three arguments that the decision of the trial court was an erroneous interpretation of the tariff: (1) that the article shipped is a spraying machine and therefore is within the classification of sprayers N.O.I.B.N., Item No. 15380 of Commodity Tariff 260-A, or (2) that the article shipped is a combination of a sprayer and a vat, or (3) that the article is a combination of a sprayer and a de-horning chute (Item No. 16665 Consolidated Freight Classification No. 17) or a combination of a sprayer and a stall (Item No. 16955 Consolidated Freight Classification No. 17).

A. THE ARTICLE SHIPPED IS NOT A COMBINATION OF A SPRAYER AND A STALL OR A SPRAYER AND A DE-HORNING CHUTE.

The latter two arguments presented by Appellant assume that the Respondent's contention that the Spray-Dip is a combination article is correct and take issue only with the description of the articles of which it is a combination.

Certainly, if the machine is a combination of a sprayer and a pen or chute, the pen or chute would be a spraying pen or chute and not a de-horning chute. There is no evidence or contention that the device is designed or used

other than to hold cattle while being sprayed. Certainly nothing is shown that it is a device to hold the animal for de-horning. In fact, the manufacturer expressly testified that it could not be so used:

“The only way he could get to an animal in this machine of ours would be to get inside. Surely nobody would be foolish enough to get inside with a bull to castrate or de-horn or brand him. This machine can’t possibly be used for anything except the thing we have designed it and built it for. We wish it could. We wish we could sell it for other purposes. There would be more sales. But I can’t think of anything other in the world than what we sell it for, the spraying of cattle.” (Tr. 61).

Nor would the stall classification (No. 16955) apply. A “stall” is defined in *Webster’s New International Dictionary*, Second Edition, 1946, as:

“A place where horses or cattle are kept; a stable, a manger; esp. the compartment or division of a stable for one horse, ox or the like.”

“Pen” is defined in the same dictionary as:

“A small enclosure for animals; any small place of confinement.”

“Chute” is defined in the same dictionary as:

“Agric., a narrow high walled passageway or similar device for holding or restraining animals, esp. cattle, as for branding or de-horning.”

Certainly the description, spraying pen or chute, (Item 16937, Consolidated Freight Classification No. 17) is a more accurate and complete description of the portion of the Spray-Dip, designed to restrain or confine the animal while it is being sprayed than to describe it as a place where horses or cattle are kept. A stall is generally regarded as a more permanent place for keeping the animal, as in a stable. Then too, the descriptive participle "spraying" makes the application of Item 16937 more exact. It is also significant that the stall item appears in the original Consolidated Freight Classification No. 17, but that the more particular item, spraying pen or chute (16937) did not appear until the issuance of Supplement No. 8 to Consolidated Freight Classification No. 17. Both items 16665 and 16955 are K. D. (knocked down) items. The Spray-Dip was shipped set-up. (S. U.).

B. THE SPRAY-DIP IS NOT A COMBINATION OF A SPRAYER N.O.I.B.N. AND A VAT.

Appellant's argument that the portion of the spray dip classified by the trial court as "an enclosure or device for holding or restraining cattle while being sprayed with D.D.T. or other new and modern insecticide" is a vat rather than a spraying pen or chute ignores the plain meaning of the words. As Appellant contends at Page 11 of its Brief: "Neither of the parties can urge a strained or unnatural construction." Vat is defined in *Webster's New International Dictionary*, supra, as:

"1. A large vessel, cistern, tub or barrel; esp., such a large vessel for holding liquors in an im-

mature state. 2. A measure of capacity. 3. A liquor containing a dye which has been converted by reduction into a soluble non-dyeing form. 4. A salt pit."

Clearly, the large boxlike structure in which the animal is confined while being sprayed is not a vat. The only place where liquid is stored or held on the Spray-Dip is in the storage tank on the side of the article above its right wheel. See Plaintiff's Exhibits "A" and "B". The court so found upon examining the exhibits and viewing one of the articles in question. (Tr. 63). Mr. William Abildgaard, the representative of the manufacturer of the machine also testified that that portion of the article is to hold the animal, not to store liquids.

"Well, it has all of those different components that any spraying machine has, plus instead of having to hold the animals or drive them up into a corner some place and have them flouncing around, you drive them into this machine, that is, one at a time." (Tr. 54).

"It goes down through the floor into the drain pit, picked up automatically by an injector, brought up through a revolving strainer where all the foreign matter is taken out, and drops back into the tank and used over and over again." (Tr. 55).

"Q. Then this shown here at the top and shown again in these two photographs, and on Exhibit B, are including the space--"

"A. Yes."

"Q. --To restrain or hold the animal?"

"A. Yes, and to catch the chemical."

“Q. That collects in the bottom?”

“A. Yes.”

“Q. But the animal comes in one end, the doors are shut, and it is restrained in there?”

“A. Yes.” (Tr. 57).

“Q. So the function of this piece on here is to hold the animal?”

“A. To hold him and spray him.” (Tr. 58).

It may be granted that the spray dip makes the old method of putting cattle through a dipping vat obsolete as is shown in Plaintiff's Exhibit “A” and as testified by witness Abildgaard:

“Q. What particular portion in that does this machine take, in the method of dipping?”

“A. Well, of course, this replaces the dipping vat.”

“Q. What position in the method, the older method of dipping livestock, what position in that method of dipping would this machine take?”

“A. Well, as I would understand it, that old method of dipping livestock, this simply replaces it. That has become obsolete.” (Tr. 60).

But the mere fact that the automobile made the horse and buggy obsolete does not warrant calling the automobile a horse and buggy or the automobile motor a horse.

Further, even if it be regarded as a vat or tank, the same first-class rate would apply as applies under the

tariff as interpreted by the trial court. See Items 41620, 51705, 41785 of Consolidated Freight Classification No. 17. (Exhibit "C").

C. THE SPRAY-DIP IS NOT A "SPRAYER N.O.I.B.N."

Appellant contends that the spray-dip is a machine and as such its parts are to be disregarded. It further contends that the best description of this machine is "sprayers N.O.I.B.N." appearing in the Commodity Tariff 260-A. N.O.I.B.N. means "not otherwise indexed by name." Therefore, that description could apply only if there were no description or combination of descriptions which more specifically describe the article.

Darling v. N.Y.C. and St. Louis R.R., 213 I.C.C. 418 (1935).

It was stipulated by counsel (Tr. 47-50) that Mr. L. N. Brown, the tariff expert produced by Plaintiff would have testified that in his opinion there is no commodity rate for the article in Tariff 260-A and that it is his opinion that there is no specific description to cover the article in Consolidated Freight Classification No. 17, but that the classification most closely applying to this article is a combination of 16937 first appearing in Supplement 8, Consolidated Freight Classification under the heading "Farm, Dairy, Garden, Livestock, Orchard, Poultry Equipment" as spraying pens or chutes, livestock, N.O.I.B.N., wood and steel combined, loose or in packages, to which the first-class rate applies on L.C.L. shipments and sprayers N.O.I.B.N. under Item 41017

of Classification No. 17. No contrary evidence was presented by Defendant. There was adequate evidence to support the finding of the court. In fact, none opposing it. It is elementary that if there is sufficient evidence to support the findings of the trial court, its findings are conclusive.

Woolf v. Gray, supra.

The court found that a combination of "spraying pens or chutes" and "sprayer" was a more specific description of the Spray-Dip than merely "sprayer." The combination rule provides:

"Rule 18. Combination Articles. When not specifically classified articles which have been combined or attached to each other will be charged at the rating for the highest classified article of the combination." Consolidated Freight Classification No. 17, Page 138. Ex. "C."

Therefore, the rate applicable to spraying pens or chutes, which is a first-class rate, would apply to the shipment of Spray-Dips.

Other examples of the application of the combination rule are:

Day and Night Water Heater Co. v. Southern Pacific Co., 161 I.C.C. 45 (1920).

In that case an item known as a thermostatic valve was shipped. This consisted of a brass valve and a thermo-

stat, consisting of a carbon rod in a copper tube. As installed in a water heater, the valve is inserted in the gas feed pipe and the carbon and copper element in the water space of the heater. With variations in temperature, it would increase or decrease the flow of gas to the burner. The article was originally shipped and billed as "brass valves," there being no specific rate for thermostatic valves. The Interstate Commerce Commission held that the item was a combination of a brass valve and a thermostat and under the Combination Rule would take the higher rate.

Spence v. Director-General, 87 I.C.C. 339 (1924).

In that case, gasoline engines with gears which could be disconnected by means of a clutch were shipped. They were billed and freight was collected originally under the item of "engines N.O.I.B.N." The I.C.C. held that it was a combination of a gasoline engine N.O.I.B.N. and pumping powers and applied the higher rate under the Combination Rule.

Humble Oil & Refining Co. v. Cisco and N. E. Railway, 186 I.C.C. 153 (1923).

In that case tool joints were attached to pipe. The I.C.C. held that these were a combination article and applied Rule 18.

Crancer v. Lowden, 121 Fed. 2d. 645; affirmed 315 U. S. 631, 86 Law Ed. 1077.

In that case, used pipe was shipped. Some of the pipe had protectors on the end to protect the thread. Some of the pipe could be re-used and some could only be re-melted. The item was shipped as "scrap iron, N.O.I. B.N." classification. The court held that it was a combination of pipe, used pipe and pipe fittings and applied the highest rate under the Combination Article Rule.

It is clear from the evidence that the Spray-Dip is more than an ordinary sprayer, such as a housewife uses on the ants, flies, rodents, or other insect pests, or such as a farmer uses on fruit trees, similarly to destroy insects. A "sprayer" is defined in Webster's New International Dictionary, *supra*, as "any instrument, device or mechanism for spraying liquids." The Spray-Dip not only spray liquids on animals, but it collects the excess liquid, filters it, stores it and uses it again, and, at the same time, confines the animal and holds it still while spraying it. As testified by Mr. Abildgaard:

"Well, it has all of those different components that any spraying machine has, *plus* instead of having to hold the animal or drive them up into a corner some place and having them flouncing around, you drive them into this machine, that is, one at a time." (Tr. 54. Emphasis supplied.)

"And this place of confinement is specially designed to hold the animal in line for the spraying operation." (Tr. 59).

An examination of the machine itself convinced the trial court that there was more than a sprayer involved and that it could be more specifically described as a sprayer combined with a spraying pen or chute than as merely a sprayer. The only items otherwise specified in CFC 17 are automatic animal sprayers, (16935) and boiler or furnace sprayers (27550). It is inconceivable that the same generic word "sprayers" that would include "flit guns" and garden sprayers would be considered to describe more closely a Spray-Dip than the combination description of "spraying pens and chutes" and "sprayer." The issue in

Tubbs v. Mechanics' Insurance Co., 131 Iowa 217, 108 N. W. 325.

cited by Appellant was whether "machinery of all kinds and descriptions" as used in an insurance policy was a description broad enough to include a steam boiler and pipe installed in a steam laundry, not whether there was some term in the policy which more specifically described the boiler and pipes. Granted that the Spray-Dip is a sprayer, but is it also more specifically described in the tariff? That is the issue here.

For example, a refrigerator is in a sense a machine for cooling food, but it could be more specifically described than referring to it as a cooling machine by

calling it a combination of a cooling unit and an insulated storage box.

e.g. *Norge Corp. v. Long Island R. R.*, 220 I.C.C. 470.

WHEREFORE, Respondent submits that the trial court did not err and that the decision below should be affirmed and Respondent be awarded its costs herein.

Respectfully submitted,

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